(3) No. 03-353

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Cross-Petitioner,

v.

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF

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The Advocat Defendants petitioned for a writ of certiorari asking this Court to review the judgment of the Supreme Court of Arkansas to determine whether that court correctly followed *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); yet, now they argue that this Court should not review the one point on which the opinion of the Arkansas court actually misstates the holding in *Gore*. For the reasons stated in its Brief in Opposition in Case No. 03-160, the Sauer Estate submits that this is not a case in which the Court should grant a petition for writ of certiorari. However, if this Court decides to grant a petition for writ of certiorari to review the Arkansas court's application of the *Gore* standards, that review should be thorough; it should be a review to determine whether the Arkansas court correctly followed *Gore*, not a review limited to a search for a way to help the Advocat Defendants.

I. The Decision Of The Supreme Court Of Arkansas As To The Appropriate Amount Of Punitive Damages Is So Interwoven With Federal Law That It Is Not Clear From The Face Of The Opinion That It Rests On Adequate And Independent State Law Grounds.

The Advocat Defendants argue that the decision of the Supreme Court of Arkansas to order a remittitur of the punitive damages from $63 million to $21 million should not be reviewed because the decision was based on an adequate and independent state law ground. That argument is wrong. When a state court decision appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will conclude that the state court decided the case the way it did because it believed that federal law required it to do so. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

See also Ohio v. Reiner, 532 U.S. 17, 20, 121 S. Ct. 1252, 149 L. Ed. 2d 158 (2001); *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990); *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152, 104 S. Ct. 2267, 81 L. Ed. 2d 113 (1984). Here, the analysis of the Supreme Court of Arkansas as to the appropriate amount of punitive damages rests primarily on the decisions of this Court in *Gore* and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). That analysis is so interwoven with the decisions of this Court interpreting the due process clause of the Fourteenth Amendment that no adequate and independent state ground is clear from the face of the opinion.

The Supreme Court of Arkansas stated:

> Viewing all of the pertinent evidence together, we conclude that punitive damages were indeed appropriate in this case. The question, however, as was the case with compensatory damages, is the amount of those damages. We conclude that an award of $63 million in punitive damages shocks the conscience of this court as a civil penalty. We will consider what remittitur is appropriate after an analysis under *BMW of North America, Inc. v. Gore*, *supra*.

Pet. App. 18a. Then, in the next several pages of its opinion, the Arkansas court explained and applied the *Gore* factors. Pet. App. 18a-25a. Immediately after its discussion of the *Gore* factors, the court stated:

> We hold that the [trial] court abused its discretion in not granting a new trial due to excessive punitive-

> damages awards or, alternatively, in failing to grant a remittitur. We further hold that under Arkansas law and under the three *Gore* factors, $63 million was a grossly excessive award and one that could not have been anticipated by the appellants. . . . We grant the remittitur and reduce the total of the punitive damages awarded by two-thirds to $21 million, and provide for joint and several liability. We do so on the basis that this is reasonable under our *de novo* review.

Pet. App. 25a.

It is apparent that, as to the amount of the remittitur, the decision of the Arkansas court was guided by that court's analysis of the three *Gore* factors. Although the court mentioned "Arkansas law" in the holding, the entire analysis of "what remittitur is appropriate" was based upon the three *Gore* factors. The opinion contains no discussion of "what remittitur is appropriate" under Arkansas law. The conclusion that the punitive damage verdict of $63 million was "one that could not have been anticipated by the appellants" flows directly from the court's analysis of the third *Gore* factor. No case decided under Arkansas law holds that what could have been anticipated is a relevant consideration in assessing the amount of punitive damages. The holding that the punitive damages verdict of $63 million "could not have been anticipated" by the Advocat Defendants, like the seven-page discussion that preceded it, is based on the Arkansas court's reading of *Gore*. Hence, the state court decision rests primarily on federal law or is interwoven with federal law. The state court decision does not rest on adequate and independent state law grounds.

II. The Supreme Court Of Arkansas Erred In Failing To Recognize That The Most Important Indicium Of The Reasonableness Of Punitive Damages Is The Reprehensibility Of The Conduct And In Failing To Recognize The Weight To Be Given To The Terms Of Imprisonment For The Conduct At Issue.

The Supreme Court of Arkansas stated in its opinion in this case, "[t]hough the Sauer Estate's counsel disputed this at oral argument, we conclude that the three *Gore* criteria must be given equal weight." Pet. App. 20a. That statement is contrary to this Court's holding in *Gore*, where this Court stated, "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. *Gore* noted that the flagrancy of the misconduct is the "primary consideration in determining the amount of punitive damages." *Id.* at n.23. The opinion of the Arkansas court contradicts the holding in *Gore*.

While the Advocat Defendants pay lip service to the notion that the three *Gore* factors should be considered together, the logic of their argument would reduce the three *Gore* factors to only one, *i.e.*, the disparity between the punitive damages award and other penalties authorized or imposed in comparable cases. On their argument, the whole *Gore* analysis is reduced to a determination of whether the punitive damages award exceeds sanctions imposed in prior cases. When a punitive damages award exceeds previous awards, a defendant can always say that it did not have notice of the sanction that might be imposed. If the Advocat Defendants' argument were to be adopted, no matter how reprehensible the conduct of the defendant, a punitive damage award could never exceed the highest punitive damage award previously affirmed by the state supreme court. Their argument would permit the state courts to take into account the

reprehensibility of the conduct in the decision as to whether to award punitive damages, but, in any case, the amount of the award could never exceed the highest award previously affirmed in that state. Nothing in the opinions of this Court holds or even suggests such a result.

It seems odd that someone would say that he might not have starved an elderly person to death if he had known the amount of punitive damages that might be imposed for such conduct, but in essence that is what the Advocat Defendants say. To some extent, they persuaded the Supreme Court of Arkansas that this Court's holding in *Gore* legitimates such an argument – hence the remittitur of $42 million of the $63 million punitive damages award. BMW could legitimately argue that it would have disclosed that the car sold to Gore had been repainted at a cost of $601.37 [517 U.S. at 564] if it had known the amount of punitive damages that might be awarded for not making that disclosure, but that argument takes on an entirely different character and carries far less weight when advanced by a person liable for neglect and abuse of a vulnerable, helpless person. The vast difference in the reprehensibility of BMW's failing to disclose a $601.37 paint job and the Advocat Defendants' causing Margaretha Sauer's death by "severe malnutrition and dehydration" [Pet. App. 8a] means that BMW's argument cannot simply be transposed into this case. The Arkansas court's legitimization of the Advocat Defendants' argument represents a misreading of *Gore*; and we ask that, if the Court grants certiorari, this issue be considered as a part of a thorough review of the application of the *Gore* factors in this case.

III. The Sauer Estate Did Not Misstate The Facts.

Much of the Advocat Defendants' brief in opposition is devoted to an argument that the Sauer Estate has misstated the facts in its Conditional Cross-Petition For A Writ Of Certiorari. In particular, the Advocat Defendants complain about the description of the three of them as operating one business and participating in the management and direction of the nursing home. The uncontradicted evidence, offered through the deposition testimony of the chief financial officer of the Advocat Defendants, showed that they were operated as one business. Pet. App. 17a-18a. The trial court found that they were operated as one business. Pet. App. 40a-41a. Upon *de novo* review of the record, the Supreme Court of Arkansas, in a unanimous opinion, held that the three were operated as one business. Pet. App. 25a-26a. The Advocat Defendants may disagree with this conclusion (though they offered no evidence to the contrary at trial), but it takes some audacity to say that the Sauer Estate's reiteration of the unanimous finding of every judge who has looked at the record of this case is a misstatement of the facts.

Furthermore, the Supreme Court of Arkansas held that the fact that the three Advocat Defendants were operated as one business was a reason to reduce the punitive damages, not a reason to increase the punitive damages. In ordering a remittitur reducing the total punitive damages award from $63 million to $21 million, the court stated, "[w]e conclude that one business is involved in the management of Rich Mountain and that it shocks the conscience of this court to award the same amount of punitive damages against the parent company and the two subsidiary companies." Pet. App. 25a-26a. The Advocat Defendants are in the peculiar position of attacking the finding of fact stated by the Supreme Court of Arkansas as a basis for reducing the punitive damages award; and they accuse the Sauer Estate of misstatement when it reiterates this finding of fact and the evidence supporting it. If, as they contend, this finding was error, it was an error that favored them.

CONCLUSION

For the reasons stated in their opposition to the Advocat Defendants' petition for writ of certiorari, the Sauer Estate contends that this Court should not accept this case for review. However, if the Court grants the petition, the Sauer Estate respectfully submits that the Court should review in its entirety the application of the *Gore* factors by the Supreme Court of Arkansas; correct the error of the Supreme Court of Arkansas in holding that the three *Gore* factors should be given equal weight; and reinstate the jury verdicts of $21 million in punitive damages for each of the three defendants.

Respectfully submitted,

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